Central Law Journal.

ST. LOUIS, MO., MAY 20, 1898.

In the interpretation of federal organic law, by the highest court of the United States, there is to be noticed, with the extension of national and the limitation of State control over commerce, a steady maintenance of the right of the States of the Union to enforce strictly police regulations. A striking illustration of this is found in the decision recently rendered by the United States Supreme Court, in the case of the Missouri, Kansas & Texas Ry. Co. v. Haber. This case arose upon proceedings to test the constitutionality of the law of Kansas prohibiting the transportation into that State of cattle affected with Texas fever and providing for civil actions for damages in case of infractions of the law. The validity of this law was attacked upon the ground that it was repugnant to the constitution of the United States, and also upon the ground that domestic cattle were sufficiently protected by federal laws and by the regulations of the Agricultural Department under the act establishing the Bureau of Animal Industry. The court in its decision sustained the constitutionality of the law.

It laid down the doctrine, in the first place, that the act of congress did not assume to give any corporation, company or person the affirmative right to transport from one State to another State cattle that were liable to impart or capable of communicating contagious, infectious or communicable diseases, but, on the contrary, that it was made by the Animal Industry act a misdemeanor to deliver for transportation, or to transport or drive from one State to another, cattle known to be affected with such diseases. The question whether a corporation transporting, or the person causing to be transported, from one State to another, cattle of the class specified in the Kansas statute is liable in a civil action to such damages as may be sustained by the owners of domestic cattle by reason of the introduction into their State of such diseased cattle is a subject about which the Animal Industry act does not assume to make any provision. It does not declare that the regulations established by the commissioner of agriculture should have the effect to exempt from civil liability one who but for such regulations would have been liable either under the general principles of law or under some State enactment for damages arising out of the introduction into a State of cattle so affected. Furthermore, the secretary of agriculture did not assume to give protection to anyone against such liability.

One argument, of which much use was made by the opponents of the Kansas statute, was that it was inconsistent with the Interstate Commerce law. In disposing of this argument Mr. Justice Harlan, who read the opinion of the court, said that the Kansas statute was not within the meaning of the constitution, nor in any just sense a regulation of commerce among the States. It cannot, he said, be supposed to have been so intended, even if its validity were to depend upon the intent with which it was enacted. It did nothing more than declare as a rule of civil liability that anyone driving, shipping or transporting, or causing to be driven, shipped or transported, into or through any county in that State, cattle capable of communicating Texas splenic or Spanish fever to domestic cattle should be liable in damages. The conclusion was further reached that, even if the subject of such regulations as were made by the State under the law in question were one that may be taken under the exclusive control of congress and be reached by national legislation, any action taken by the State that does not directly interfere with rights secured by the constitution of the United States or by some valid act of congress might be respected until congress intervenes. With the argument thus disposed of went the contention that the Kansas statute violated section 5,258 of the Revised Statutes, which authorizes railroad companies to transport troops, government supplies, mails, freights and properties from one State to another. The section in question, the court said, did not authorize the transportation of diseased cattle any more than it did the transportation of rags known to be infected with yellow fever, and a railroad company was in reality not hindered or obstructed in the exercise of any privilege given or authority conferred by the section mentioned, and this must be so unless it should be held to be entitled of right to carry into a State from another State as freight or property cattle liable to impart or capable of communicating disease.

NOTES OF IMPORTANT DECISIONS.

CARRIERS OF PASSENGERS—DEFECTIVE PLATFORM — CONTRIBUTORY NEGLIGENCE.—In Missouri, etc. Ry. Co. v. Turley, 85 Fed. Rep. 369, decided by the United States Circuit Court of Appeals, Eighth Circuit, it appeared that at an unimportant way station, where defendant had no depot, and sold no tickets, it maintained a platform for the sole purpose of ingress and egress to and from the cars. It was about 8 feet wide and 80 yards in length. The track was on the east side, where the platform was about 4 feet high, and not protected by railing, and no lights were maintained. Plaintiff, a stranger in the neighborhood, and unfamiliar with the platform, came to the station on a dark night, to take passage on a train. She went upon the platform from the west side, and, supposing it was the same height on the east side, and intending to sit down upon the edge of it, she stepped off in the darkness, and was injured. It was held that she was guilty of contributory negligence. The court said in part: "Considering the entire statement, it is made manifest that the plaintiff was not induced to take the step she did into darkness, following the example of her sister, as she evidently sought to have the jury believe, because in the same connection, she described the manner in which her sister reached a sitting posture on the edge of the platform, 'My sister sat down on the edge of the platform, and shoved her feet off.' Why should her sister shove her feet off of the platform after sitting down, if it was level with the ground? The very method adopted by her sister was umistakable admonition to a sane person—First, that the locality of the ground was not level with the platform; and second, that by shoving her feet off they must have descended below. This should, in addition to the darkness of the night, and the unfamiliarity with the situation, have excited especial attention and precaution. But in a misting rain, and very dark, with no other precaution than a look of the eye, and without imitating the action of her sister, she stepped off into air. This was so reckless as to admit of no two opinions among reasonable men as to its negligent character. The platform, manifest to any person, was built for the sole purpose of ingress to and egress from the cars. Its edge was not designed for a place for passengers to go in the nighttime and sit upon. The plaintiff was not invited by anything naturally or incidentally connected with the use of the platform to so undertake to sit down on its edge. The accident was in no degree probably incident to the taking of passage on defendant's train. Such use of the edge of the platform, on a very dark night, was so disconnected and remote from the purpose of its construction as to preclude any possible admissible relation between the imputed neglect of the defendant to barricade the sides of or to light the platform and an accident resulting as this did.

"No parallel to this action is found in any recognized authorities. The case of Railway Co. v. Neiswanger (Kan. Sup.), 21 Pac. Rep. 582, principally relied upon by the court below, is not entirely this case, in that the plaintiff there did not purposely undertake to sit down on the edge of the platform, knowing that it was not protected, but undertook, under imperative necessity, to pass from the platform to seek permissible concealment, under circumstances that did not admit of deliberate movement. The exoneration from contributory negligence in that case was extreme, and ought not to be extended, lest its application should lead to a practical establishment of the doctrine that a railroad company is to be treated as an absolute insurer of the safety of passengers waiting about its platform, however eccentric and thoughtless in their strolling movements. We prefer the better sustained rule recognized in Forsyth v. Railroad Co., 103 Mass. 570; Reed v. Railroad Co., 84 Va. 231, 4 S. E. Rep. 587; Bennett v. Railway Co., 57 Conn. 422, 18 Atl. Rep. 668; Railway Co. v. Hodges (Tex. Civ. App.), 24 S. W. Rep. 563; Chewning v. Railway Co. (Ala.), 14 South. Rep. 204. These cases support the rule that, although a railway company may be guilty of some negligence in not providing sufficient lights or railings about its platform, yet when these deficiencies are known, or are obvious to the passenger, and notwithstanding he sees fit voluntarily, without invitation from the company, and for his mere convenience, to undertake to pass over the edge of the platform, without knowledge of its elevation, the law will not excuse his negligence in taking no other precaution than a casual look when the night is so dark as to deceive the eye in appearances. The passenger ought not to cast the consequences resulting immediately from his own reckless impulse upon the railway company for not fencing or patrolling its platform, or flooding the ground around it with artificial lights."

BILLS AND NOTES—CONFLICT OF LAWS—LAW OF PLACE — INDORSER.—The Supreme Judicial Court of Massachusetts, in Wylie v. Cotter, decides that the rights and liabilities of the parties on a note made and payable in another State are to be determined by the laws of that State, that by the laws of New York, one who puts his name on the back of a note, before delivery, is a mere indorser, and not a joint maker or guarantor, and that the question as to what is the law of another State on a given point, where it is determined from conflicting decisions, is one of fact, to be proved; and the finding of the trial court thereon will not be revised on appeal if there is evidence to support it. Knowlton, J., says: "The note in suit was payable in New York, and was made and delivered there. The rights and liabilities of the parties are therefore to be determined by the laws of New York. Lawrence v. Bassett, 5 Allen, 140; Woodruff v. Hill, 116 Mass. 310; Jewell v. Wright, 30 N. Y. 259.

"By the law of New York, one who puts his name on the back of a note before delivery, as the defendant in this case did, is a mere indorser, and

not a joint maker or guarantor. Like that of any other indorser, his liability does not become absolute until after a proper demand and notice. Hall v. Newcomb, 7 Hill, 416; Meyer v. Hibsher, 47 N. Y. 265; Phelps v. Vischer, 50 N. Y. 69.

"In the present case a demand was made and notice was given on or about July 31, 1893, more than a year and a half after the date of the note, which by its terms was payable on demand. The question is whether this was within a reasonable time, so that the indorser was charged thereby. To show the law of New York bearing upon this question, certain statutes, together with 35 decisions of courts in that State, were put in evidence. The law of another State is a fact to be proved, like any other fact, by evidence. Where the evidence is a single statute or a decision of a court, the language of which is not in dispute, the interpretation of it presents a question of law for the court; but where the law is to be determined by considering numerous decisions, which may be more or less conflicting, or which bear upon the subject only collaterally, or by way of analogy, and where inferences must be drawn from them, the question to be determined is one of fact, and not of law. Hackett v. Potter, 135 Mass. 349; Bank v. Wood, 142 Mass. 563, 8 N. E. Rep. 753; Ufford v. Spaulding, 156 Mass. 65, 30 N. E. Rep. 360; Bride v. Clark, 161 Mass. 130, 36 N. E. Rep. 745. In the present case it is not contended on either side that any statute or decision introduced in evidence relates to a contract identical with that before us, but the counsel for the plaintiff argues from the cases in New York on one side and the other that the principles established, when applied to this note, entitled him to a verdict; while the counsel for the defendant argues to the contrary. The judge of the superior court, in considering the evidence, was called upon to determine, as well as he could, what is the present state of judicial opinion in the highest court of New York in reference to the question before him, as manifested by the published decisions of that court. The matters involved in reaching this conclusion presented a question of fact. On this bill of exceptions we cannot revise his finding upon this part of the case, unless it appears that there was no evidence to warrant it; or in other words, unless the statutes and decisions conclusively show, in spite of any possible inference of fact or doubts in the interpretation of them, that his finding is wrong.

"The plaintiff relies principally upon Merritt v. Todd, 23 N. Y. 28, the headnote of which is as follows: 'A promissory note, payable on demand, with interest, is a continuing security, and the indorser remains liable until actual payment; and the holder is not chargeable with neglect for omitting to make such demand within any particular time.' So far as appears, this case has never been overruled, but it has been, at different times, reaffirmed. Pardee v. Fish, 60 N. Y. 265; Parker v. Stroud, 98 N. Y. 379. On the other hand, the courts have been disinclined to extend it. In Herrick v. Woolverton, 41 N. Y. 581, Foster, J., speaking for the court, says: 'I think the case of Merritt v. Todd has extended the principle of continuing security in such a case to the very verge.' See, also, Crim v. Starkweather, 88 N. Y. 339. In the opinion in Merritt v. Todd much stress was laid upon the fact that the note, although payable on demand, expressly provided for payment of interest. The court said: 'If the security be not on interest, it may be a fair exposition of the contract to hold that no time of credit is contemplated by the indorser, and that the demand should be made as quickly as the law will require upon a check or sight draft.' This distinction between demand notes bearing interest and those not bearing interest was made in Wethey v. Andrews, 3 Hill, 582, and recognized in Salmon v. Grosvenor, 66 Barb. 160, and in later cases. The note in suit does not bear interest. The plaintiff seeks to bring the case within the doctrine of Merritt v. Todd by reason of the letter which was sent by the plaintiff's agent with the note; but the defendant was not a party to the letter, and did not authorize it. She is not bound by its language. By writing her name on the back of the note, and leaving it, under the circumstances disclosed, she bound herself in favor of one receiving it in good faith and for value in the form in which it appears. She did not authorize anybody to bind her by a writing other than the note. So far as the arrangement made in regard to the consideration of the note bears upon the construction of it, her liability may be affected. The testimony was that the consideration was made up of $2,000 already due the plaintiff from the firm of Richard H. Dana & Co. and $3,000 to be advanced to that firm. The last of these advances was made on or about June 1, 1892. In the view most favorable to the plaintiff, the letter can only be considered as a part of the evidence in regard to the consideration of the note. Under the law of New York, is a note written in this form, given for such a consideration, to be deemed a continuing security, on which the indorser is liable for an indefinitely long period without a demand and notice? It is one question whether it is a continuing security until the advancements have been made to the amount agreed upon, and it is a different question whether it is to be a continuing security after that. That it is written without interest is an important fact, in the light of the authorities in New York. If the consideration had been money lent to the amount of $5,000 when the note was given, it seems pretty clear, under the authorities in New York, that the note, in its present form, would not be a continuing security, on which an indorser would remain liable for six years without a demand or notice. The question before the superior court upon this branch of the case was by no means free from difficulty. We think it cannot be said, as matter of law, that the finding of the judge upon the evidence was erroneous."

ABSOLUTE PRIVILEGE AS A LEGAL EXCUSE IN LIBEL SUITS.

Libel Defined.—It may be premised that defamatory words published by means of writing, printing, signs or pictures, prior to the beginning of an action,[1] to a third person,[2] and understood by at least some one third person by whom they have been read,[3] and tending to render one liable to punishment,[4] to expose him to public hatred, contempt or ridicule,[5] to injure him socially,[6] or in his office, trade, profession or business,[7] and thus expose him to pecuniary injury, are libelous *per se*, are *prima facie* a wrong and *prima facie* actionable, without proof of special damage, when published without legal excuse.[8] The law implies both malice and damage from their publication, and that the defendant intended the injury his words were calculated to effect.[9]

Absolute Privilege as a Defense in England.—Text-books state in a general way that legal excuses are of two kinds: those furnishing an absolute defense, depending in no respect for protection on the *bona fides* of the defendant, and those furnishing a conditional or qualified defense, depending upon whether the party acted in good faith, without malice. English writers and former decisions conceded absolute privilege to proceedings in parliament, and publications of its proceedings made by members in the course of legislative duty, and to proceedings in courts of justice, and publications of such proceedings. The privilege extended to parties, counsel, witnesses, jurors and judges in a judicial proceeding, and to all who, in the discharge of public duty, or in the honest pursuit of private right, are compelled to take part in the administration of justice or legislation;[10] but the provisos were always attached to reports of proceedings of courts that they must be full, fair, impartial and correct,[11] not tending to excite disaffection or calculated to offend the morals of the people, nor defamatory of the character of a private individual.[12] The later English decisions, however, have returned to the rule laid down in the old case of Toogood v. Spyring,[13] where the fact that statements injurious to the character of another have been fairly made by some person in the discharge of a public or private duty, legal or moral, or in the conduct of his own affairs in matters where his own interest is concerned, is held to afford but a qualified defense, depending on the absence of actual malice. Toogood v. Spyring is supported by numerous authorities,[14] and is said, in Brow v. Hathaway,[15] to state the broad, general principle referred to in nearly all later decisions, and in Gassett v. Gilbert[16] it is said to be a leading case, and to best define the precise limits within which the publication of defamatory matter is allowed.

Are Proceedings in Courts Protected by the Rule?—It is much to be doubted whether, even in England, the fact that a defamatory utterance was made in the course of a judicial proceeding would protect witnesses, jurors, counsel, or even the presiding magistrate, if the element of malice entered into such utterances. Chief Justice Cockburn, in Thomas v. Churton,[17] said: "I should not wish to lay down the broad proposition that in no case is a judge liable for words uttered by him as a judge," and Chief Justice Tilghman, in McMillan v. Birch,[18] said: "If an attorney abuse his privilege under pretense of pleading his cause, designedly wander from the point in question, and maliciously heap slander upon his adversary, I will not say he is not responsible in an action at law." In Higginson v. Flaherty,[19] it was said: "A

[1] Townshend, Sl. & L. § 109; 21 How. 202; 52 Ind. 273.

[2] Townshend, Sl. & L. p. 83, §§ 95, 108.

[3] Townshend, Sl. & L. § 108.

[4] White v. Nichols, 3 How. 266.

[5] 2 Manning & Ryan, 74; 6 M. & W. 105; 6 Conn. 391; 6 Vt. 489; 111 Pa. 145; 60 Md. 158.

[6] 5 Harr. (Del.) 475; 8 Blackford (Ind.), 426; 1 Walker (Miss.), 403; 4 Mass. 163 8; 4 Ark. 110; 1 Starkie, Sl. 169.

[7] Clifford v. Cochrane, 10 Bradw. (Ill. App. Ct.) 570.

[8] Townshend, Sl. & L. § 208.

[9] Schmisseur v. Kreilich, 92 Ill. 348; Flagg v. Roberts, 67 Ill. 485; 10 Bradw. (Ill. App. Ct.) 570.

[10] Heard, L. & S. §§ 90, 103, 110; Odger, L. & S. 185.

[11] Flint v. Pike, 4 B. & Cr. 473-8; Starkie, Sl. & L. § 268; Odger, L. & S. 256; MacDougall v. Knight & Sons, 17 L. R. Q. B. D. 636; Stiles v. Noakes, 7 East, 503.

[12] Rex v. Carlile, 3 Barnw. & Ald. 167; Rearick v. Wilcox, 81 Ill. 77.

[13] 4 Tyrwhitt, 582-595.

[14] Bull. N. P. 8 (Lord Mansfield's decision); 4 Burr. 2425; 8 B. & Cr. 578; 9 B. & Cr. 403; 10 C. B. 583; 1 Starkie, Sl. 292 3.

[15] 13 Allen (Mass.).

[16] 6 Gray (Mass.), 94.

[17] 2 B. & S. 475.

[18] 1 Bin. 178.

[19] Regina v. Hutchins, 4 Ir. L. R. (N. S.) 125, 7 Ir. L. R. (N. S.) 426.

proctor is not privileged in making defamatory statements not relevant to the matter in hand," and Hodgson v. Scarlett[20] is to the same effect as to irrelevant utterances of attorneys.

Reports of Court Proceedings not Absolutely Privileged.—Odger, the latest English writer on the law of libel, does not concede absolute privilege to reports of judicial proceedings. He says the privilege attaching to fair and accurate reports may, of course, be rebutted by proof of actual malice.[21] In Stiles v. Noakes[22] the court said: "The doctrine of absolute privilege as to such reports, however truly made, must be taken with some grains of allowance. For as a judicial proceeding is privileged on principles of public convenience, the privilege is limited in respect to the subject-matter of the report, and as to the manner of the reporting;" and in Ryalls v. Leader,[23] it was said: "No case has decided that a report of proceedings in a court of justice, implicating the reputation of a third person, is under any (all) circumstances privileged."

Absolute Privilege as a Legal Excuse in the United States.—The doctrine of absolute privilege is not upheld by the weight of authority in this country, and where malice is shown, not only reports of such proceedings, but the proceedings in courts of justice lose their privileged character. The general rule is laid down in the leading libel case of White v. Nichols,[24] where privileged communications are divided, by Mr. Justice Daniels, into four kinds: 1. "Wherever the publisher acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests. 2. Anything said or written by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. 4. Publications made in the ordinary course of parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances. He applied the same rule to all, *i. e.*, that they are only conditionally privileged." He said: "But in all these cases, the only effect of the change of the rule is to remove the usual presumptions of malice. It then becomes incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion. Proof of express malice so given will render the publication or petition or proceeding libelous. Falsehood and the absence of probable cause will amount to proof of malice." We find decisions following White v. Nichols in Minnesota, New York, Illinois and Tennessee,[25] and in Baxter v. Saunders[26] the court say: "We consider this rule to be settled law in this country." In Illinois, where the constitution has, in the Bill of Rights, art. 2, § 4, defined the limits of privilege to be "the truth, when published with good motives and for justifiable ends," Mr. Justice Scholfield has, in Storey v. The People,[27] pointed out that the language of the constitution which holds every person responsible for the abuse of the liberty of free speech, must be held to apply to courts and those by whom they are conducted. "The judiciary," he said, "is elective, and the jurors appointed by a board whose members are elected by a popular vote, and there is the same responsibility, in theory, in the judicial department as in the legislative and executive departments to the people for the faithful and diligent discharge of all duties enjoined on it." In Whitney v. Allen,[28] the Supreme Court of Illinois also held that a petition to a circuit judge charging gross neglect of duty and malfeasance in office on the part of the State's attorney was not absolutely privileged. It should have been admitted in evidence, the court said, and evidence was admissible that

[20] 1 Barnw. & Ald. 232; Holt, N. P. 621; Johnson v. Evans, 3 Esp. 32.

[21] Odger, L. & S. 256. See also Rex v. Lord Abingdon, 1 Esp. 226; Rex v. Creevey, 1 Maule & S. 273; Rex v. Carlile, 3 Barnw. & Ald. 167; Lake v. King, 1 Saunders, 132, all dissenting from Curry v. Walter, 1 Bosanquet & P. 525, and Rex v. Fisher, 2 Camp. 563.

[22] 7 East, 493.

[23] L. R. 1298. See Pittock v. O'Neill, 63 Penn. 253; Townshend, Sl. & L. 367.

[24] 3 Howard (U. S. Sup. Ct. Rep.), 267.

[25] Aldrich v. Press Pr. Co., 9 Minn. 133; Commonwealth v. Blanding, 3 Pick. (Mass.) 314; Stanley v. Webb, 4 Sandford (N. Y.), 21; Ackerman v. Jones, 37 N. Y. Sup. Ct. Rep. 54; Gilmer v. Eubanks, 13 Ill. 271; Whitney v. Allen, 62 Ill. 472; Townshend, Sl. & L. p. 353, §§ 223, 224.

[26] Baxter v. Saunders, 6 Heisk. (Tenn.) 383.

[27] 79 Ill. 52.

[28] 62 Ill. 472.

it was prepared for a bad purpose, and from malicious motives, thus overruling several of their earlier decisions, so far as they held that "pleadings, declarations, answers, etc., if made in the due course of a legal or judicial proceeding, cannot be made the foundation of an action for defamation, whether true or false."[29] The Supreme Courts of Wisconsin, Massachusetts and New York have all said that the privilege of counsel must be understood to have this limitation, that he shall not avail himself of his situation to gratify private malice by uttering slanderous expressions against parties, witnesses or third persons which are irrelevant to the subject-matter of the inquiry.[30] And the reports of court proceedings are in this country, as in England, only conditionally privileged. They must be true, fair, full and faithful.[31]

What is a True Report?—"However honestly the person who publishes a libel believes it to be true, if it is untrue in fact, the law implies malice unless the occasion justifies the act.[32] It is said in the valuable English case of Flint v. Pike,[33] that a report is not true if anything is contained in it which did not pass at the trial, or if anything is suppressed which would in any way have qualified that part which reflects on the conduct of plaintiff."

What is a Fair Report?—"The word 'fair,' when used in regard to such a publication, is equivalent to 'fairly correct.'[34] It is fair if a *verbatum* report would have the same effect on his character as the report made.[35] There must be no misrepresentation of facts, or partial or garbled statements prejudicial to the character of the individual to whom they relate.[36] To misstate any part of the proceedings would be not to benefit and instruct, but to mislead the public.[37] There is not a *dictum* to be met with in the books that a man, under pretense of publishing the proceedings of a court of justice, may discolor and garble them so as to asperse the character of those concerned.[38] The defense must be published with the same degree of exactness and accuracy as the accusation, to make the report fair."[39]

What is a Full Report?—A fair summary of the leading authorities upon this point is that, while the report may be abridged, it must contain all details essential to enable others to form a correct opinion of the entire matter, to judge for themselves.[40] The weight of authority holds that the evidence must be published. "A reporter cannot publish the speech of counsel reflecting on the character of an individual, annexed to a short summary of the trial, without stating the evidence," said the court, in Flint v. Pike,[41] "and it is doubtful though the report stated the whole evidence, whether an injurious report would be justifiable unless it appeared the observations were warranted and that the party deserved them, or that they were so connected with the case that the detail was necessary for the information of the public." "He must state," said Chief Justice Abbott, in Lewis v. Walters,[42] "the whole case and not merely the conclusion he himself draws from the evidence," and in Delegal v. Highley the court held the defendant is not justified in publishing a part of legal proceedings alone.[42] In Stanley v. Webb,[43] the English authorities cited are reviewed, their views indorsed, and they are declared to be "the utterances of distinguished men, who, during the last half century, have shed light and lustre on English jurisprudence." The Supreme Court of Illinois said of a publication based on the results of a coroner's inquest: "It nowhere professes to give the evidence, or to base its statement upon it. That this does not fall within the rule of privileged publications is, then, too plain for argument,[44] and the United States Supreme Court, in White v. Nichols, also held that the evidence itself must be published, not the results. The authorities agree

[29] Strauss v. Meyer, 48 Ill. 386; Spaids v. Barrett, 57 Ill. 291; Story v. Wallace, 60 Ill. 54.

[30] Jennings v. Paine, 4 Wis. 358; Hear v. Wood, 3 Metc. 193; Parker v. Mitchell, 31 Barb. 469.

[31] Boogher v. Knapp, 97 Mo. 122; Thompson v. Powning, 15 Nev. 195; Story v. Wallace, 60 Ill. 51, 4 Sandford (N. Y.), 21, *supra*; Merrill, Newspaper Libel, 181.

[32] Hawkins v. Globe Pr. Co., 10 Mo. App. 179; Clay v. The People, 86 Ill. 152; Allen v. Pioneer Press Co., 40 Minn. 117. (English) Abrath v. N. E. Ry. Co., 11 App. Cas. 253-4; Odger, L. & S. 3.

[33] 4 B. & Cr. 473 8.

[34] MacDougall v. Knight & Sons, 17 L. R. Q. B. D. 636.

[35] Boogher v. Knapp, 97 Mo. 122-9.

[36] Starkie, Sl. & L. 272; Odger, 250.

[37] Starkie, 222 273.

[38] Thomas v. Crosswell, 7 Johns. Ch. (N. Y.) 262.

[39] Saunders v. Mills, 6 Bing. 213.

[40] Odger, 250.

[41] 4 B. & Cr. 473 8.

[42] 4 B. & Ald. 611.

[43] 4 Sandf. (N. Y.) 21.

[44] Story v. Wallace, 60 Ill. 51.

that the report need not state all that occurred *in extenso*, but if it omits any fact which would have told in plaintiff's favor, it will be a question for the jury whether the omission is material. Thus, the entire suppression of the evidence of one witness may render a report unfair.[45] A portion of the testimony may be very damaging to a person, when the whole testimony might be highly to his honor,[46] and suppression of parts of the testimony tending to qualify defamatory matter in the report, would be evidence of malice and would destroy the privilege.[47] In Melissich v. Lloyd,[48] it was said that if the judge, in summing up, has given a complete and accurate analysis of everything, speeches and evidence, * * * by publishing that you have fairly reproduced all, but you must satisfy some tribunal that this is so, and that what you have published is an accurate description of what took place at the trial, with reference to its effect on the plaintiff's case. In a suit for the recovery of insurance premiums, an appellate court, not having the evidence before them which secured the plaintiff a favorable verdict in the lower court, reversed the judgment of the circuit court and rendered an opinion in part upholding the plaintiff, and in part censuring him for misconduct. When the case came before them a second time on defendant's appeal, the evidence previously omitted through an attorney's negligence, showing that the plaintiff had not been guilty of misconduct, the court found in plaintiff's favor and exonerated him. The defendant, however, although present at the trial in the lower court and hearing the evidence, after the appellate court had reversed their unfavorable judgment, culled from their first decision the part stating that the plaintiff had misrepresented facts, and appending it to an imperfect statement of the facts in the case, omitting the evidence brought out in the lower court, as well as such remarks of the appellate court as were favorable to the plaintiff, published it as a circular and scattered it broadcast, to injure the plaintiff in his business. Here the defendant's publication was, undoubtedly, a libel, as not giving a full, fair and true report of the proceedings, as well as for other reasons of which the writer hopes to treat in a future article. Whether if he had complied with all the rules governing privileged communications, he would have been justified in publishing the appellate court's decision, is a point which has not, within the writer's knowledge, yet been decided, but it would seem not. It is not a final judgment where it reverses the judgment of a circuit court and remands a cause to that court for a new trial. The rights and liabilities of the parties are thus thrown entirely open to re-litigation.[49] The reversed decision could settle nothing. The one made on the second appeal must control.[50] The circular did not state that the cause had been remanded for further proceedings, although the published report of the decision ended with this information. To the minds of readers without legal training it conveyed the impression that the decision was final, whereas, it was but a preliminary, interlocutory one, and the defendant's action was analogous to the publication of *ex parte*, preliminary proceedings, which the weight of authority condemns, as frequently attended with great hardship to the individual, and seldom, previous to the final decision, of importance to the public, as containing any judicial information.[51]

FLORA V. WOODWARD TIBBITS.

Chicago, Ill.

[45] Odger, 250.

[46] 10 Mo. App. 179, *supra*.

[47] Merrill, Newspaper Libel, 182; Salisbury v. Rock Un. & Adv. Co., 45 Hun (N. Y.), 187; Cent. L. J., Jan. 6, 1888, article on "Civil Responsibility for Words Spoken in Legal Proceedings."

[48] 25 Weekly Rep. 353.

[49] City of Virginia v. Gipps' Brew. Co., 136 Ill. 616-618.

[50] 106 Ill. 175.

[51] Starkie, Sl. & L. 268; Stovey v. Wallace, 60 Ill. 51; 4 Sandf. (N. Y.) 21; Duncan v. Thuaites, 3 B. & Cr. 556.

REWARD—RIGHTS OF POLICE OFFICER.

LEES v. COLGAN.

Supreme Court of California, March 11, 1898.

Section 1547 of the Penal Code, providing that the governor may offer a reward for the apprehension of any person charged with an offense punishable with death, does not authorize the recovery of a reward offered by the State, by a police officer of a city who, without warrant, arrests a murderer for a crime committed in another county of the State, and for whose apprehension the reward is offered, the police officer being a peace officer whose duty it was to make the arrest.

GAROUTTE, J.: This is an appeal from an order of the superior court directing the issuance

of a writ of mandate to the State controller, requiring him to draw his warrant upon the State treasury in favor of petitioner for the sum of $1,000. The application is based upon the following facts: Petitioner was a captain of police of the city and county of San Francisco. The governor of the State offered a reward of $1,000 for the arrest and conviction of the person or persons who murdered one Webber in the city of Sacramento. Petitioner arrested the murderer of Webber in the city and county of San Francisco, and furnished witnesses and evidence upon which a conviction was subsequently had. By right of these facts he now claims the reward of $1,000. There are other matters set forth in the petition for the writ, but we do not deem them material to the issue before us.

The governor of the State offered this reward by virtue of the authority found in section 1547 of the Penal Code, and that section declares: "The governor may offer a reward not exceeding one thousand dollars, payable out of the general fund, for the apprehension: (1) * * * (2) Of any person who has committed or is charged with the commission of an offense punishable with death." It will be observed that the power of the governor is limited to offering rewards for the apprehension of certain criminals. For that reason we attach no importance to the allegations of the petition wherein it is declared that petitioner furnished the evidence upon which the murderer was convicted. It follows from what has already been said that the only question here presented is: May a police officer of the city and county of San Francisco who arrests a murderer for a crime committed in another county of the State, and without a warrant, recover a reward offered by the State for the arrest of such murderer? The answer to this question is largely dependent upon the conclusion to be reached from two other propositions of law, namely: Was it the official duty of this captain of police to make the arrest of the criminal? And, if so, is it against sound public policy to allow such an officer to receive a reward for the performance of his duty?

The last legal proposition stated must be declared in the affirmative. The courts, both in this country and England, are practically unanimous in declaring that a public officer working for a fixed compensation, or whose fees are prescribed by law, cannot demand or contract for a reward for services rendered in the line or scope of his official duty. In the well-considered case *In re* Russell, 51 Conn. 577, it is said: "And no case can be found—at least, I have not been able to find any—in which the claim of a public officer to receive a reward for services rendered in the performance of his official duties has received the sanction of a court of last resort in this country or in England." A deputy sheriff making an arrest in the line of his duty is not entitled to a reward offered for such arrest. Stamper v. Temple, 6 Humph. 113. In Morrell v. Quarles it was held that a police officer making an arrest in the line of his duty was not entitled to a reward. 35 Ala. 548. In *Ex parte* Gore, 57 Miss. 251, it is declared that a constable is not entitled to a reward for making an arrest in the line of duty, and in that case it was further decided: "The reward offered by section 2786 of the Code was designed to induce the arrest of fleeing homicides by persons not under an official obligation to do it." A police officer in the performance of his duty is not entitled to a reward for the apprehension of a criminal. Day v. Insurance Co., 16 Minn. 408, Gil. 365. A police officer cannot take a reward for services rendered within the duties of his office, or for which he receives a fixed salary. Kick v. Merry, 23 Mo. 72. The same principle is again declared in Thornton v. Railway Co., 42 Mo. App. 58. See, also, Smith v. Whildin, 10 Pa. St. 39; Warner v. Grace, 14 Minn. 487, Gil. 364. Counsel for petitioner to some extent concedes the soundness of the doctrine laid down in the foregoing cases as to rewards offered by private parties, but claims the doctrine is not to be applied to governmental or State rewards. We fail to see any substantial difference in principle as to rewards offered by private parties and rewards offered by the State. They stand upon common ground. The basis of the sound public policy supporting the text of the many cases cited is thus declared Kick v. Merry, *supra:* "The services rendered were within the duties of his office. All his energies had been devoted to the service of the city. Under such circumstances, to permit an officer to stipulate for extra compensation for services to which the public was entitled would lead to great corruption and oppression in office. It would follow that whenever a crime was committed, instead of speedy efforts for the arrest of the offender, there would be a holding back, in the hope that there would be a reward given for his apprehension. If once a habit of taking a reward is introduced, nothing will be done unless the service is previously purchased by extra pay." This reasoning undoubtedly applies to rewards offered by the State as fully as to rewards offered by private parties. No case has been cited, and we know of none, where an appellate court has declared the existence in principle of any well-defined distinction as to public officers, in cases where rewards have been offered by the State or municipality, and where rewards have been offered by private parties. No case has been cited where a reward offered by the State or municipality has been recovered by a public officer who simply did some act or acts in the performance of his official duty as the basis of his claim. To the contrary, we cite Pool v. City of Boston, 5 Cush. 219; *Ex parte* Gore, 57 Miss. 251; Pilie v. City of New Orleans, 19 La. Ann. 274; Harris v. Beavan, 11 Bush, 254; Williams v. Thweatt, 12 Rich. Law, 478.

It is insisted that when the State, by its legislature, authorized the governor to offer a reward for the apprehension of certain criminals, such reward is offered to all persons, and necessarily

includes sheriffs, police officers, etc.; and that, therefore, the State, by such action, has declared its own public policy as to rewards for the apprehension of criminals. The State has a right to declare what is sound public policy upon this question, however variant its views may be with elementary principles declared by the decisions of courts of other States and countries. And, if this State had authorized the governor in terms to offer this reward to sheriffs and other peace officers, the courts would have been bound to sustain such a law, as far as any question of public policy was concerned. But the statute here goes to no such lengths. If the State, through its governor, possessed the inherent power to offer this reward, we would hold, in line with the many decisions cited, that peace officers could not recover. Yet it would seem that the legislature, by this statute, only attempted to place in the hands of the governor a power which probably did not inherently rest in him, namely, the power of offering rewards, payable out of the State treasury, for the apprehension of criminals. The grant of a mere power to the governor to offer a reward does not necessarily carry with it any implied power to offer the reward to any and all persons. To hold that the legislature intended these rewards to be recovered by peace officers is to hold that such body intended to declare a certain course of action sound public policy in this State which has been declared unsound and vicious public policy in every other jurisdiction. While the State legislature had the power to take this radical and unusual position, we will not hold that it has taken such a step unless such an intent is plainly manifest from the act itself. Here the purpose of the act was directed to placing the power in the hands of the governor to offer rewards for the apprehension of criminals. The particular persons to whom the rewards might or should be paid was a matter not in the legislative mind. In *Ex parte* Gore, *supra*, under a very similar statute, the court said: "The reward offered by section 2786 of the Code was designed to induce the arrest of fleeing homicides by persons not under an official obligation to do it." In Harris v. Beavan, *supra*, the construction of a statute similar in principle to the one at bar was under consideration. The court there declared: "Having thus provided what was deemed suitable compensation, did the legislature intend by enacting section 8, chapter 42, *supra*, to enable commonwealth's attorneys, by entering their own names on indictments as prosecutors, to secure to themselves, in addition to the compensation otherwise provided, the compensation given by that section to prosecutors? We think not. The object had in view, no doubt, was to bring private individuals to aid the prosecution by offering as an inducement a part of the fine. It was the duty of the commonwealth's attorney to do all that he could reasonably and fairly to secure the conviction of Harris, for the salary and perquisites given him as such; and when he became prosecutor, he came under no new obligation to the State in the prosecution of the case, and could not lawfully render any service therein which he was not bound to render before assuming the relation of prosecutor." It may well be said in the case at bar that this plaintiff, in arresting the murderer, did not render any service to the State which he was not bound to render regardless of the existence of any reward.

Was it the official duty of the petitioner to arrest the murderer? There can be but one answer to this question. Section 817 of the Penal Code of this State declares a police officer of a city to be a peace officer. The arrest in this case was made without a warrant, but such fact in no degree changes the legal complexion of the merits of the litigation. Section 836 of the Penal Code declares that a peace officer may make an arrest in obedience to a warrant delivered to him, or may without a warrant arrest a person (1) for a public offense committed or attempted in his presence; (2) when a person arrested has committed a felony, although not in his presence; (3) when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. In other words, it is the duty of the peace officer to make arrests under any of the foregoing conditions. It certainly would be his duty to make an arrest where a public offense was committed in his presence. It likewise would surely be his duty to make an arrest where he held a valid warrant ordering the arrest. Yet, under the statute quoted, it is no more his duty to make arrests under such circumstances than it is when a felony has been committed, and he has reasonable cause for believing a certain person to have committed it. Here, of necessity, it must be assumed that petitioner had reasonable cause for making the arrest. It will not be assumed that he made it without good cause, and, if he had good cause for the arrest, it was his duty to make it. It cannot be contended for a moment but that a police officer would be grossly neglectful of his duty if the opportunity presented itself, and he failed to arrest a person, having reasonable cause to believe such person to be a murderer. Again, the consolidation act of the city and county of San Francisco (section 26) declares: "Police officers in subjection to the orders of the respective captains, and all under the general direction of the chief of police, shall be prompt and vigilant in the detection of crime, the arrest of public offenders, the suppression of all riots, affrays, duels and disturbance of the peace," etc. St. 1856, p. 153. Under this broad declaration of the duties of police officers, it clearly devolved upon petitioner to make this arrest. Here was a public offender; a man who had committed a horrible crime. The petitioner was a police officer, and knew the fact. Under such circumstances, it was, beyond doubt, his duty to be prompt and vigilant in taking such an offender into custody. The aforesaid section of the consolidation act further provides: "Neither the chief of police, captains or any other officer of police shall * * * receive any present or re-

ward for official services rendered or to be rendered, unless with the knowledge and approbation of a majority of the police commissioners." Whether or not this provision of the act has been repealed by subsequent legislation is not a matter of concern; for, conceding its present existence, it has no bearing upon this case. Whatever rewards police officers may accept from private parties with the consent of the police commission is another and entirely different matter. Here there is no question of agreement or consent upon the part of all parties interested. The State is here standing upon its strict legal right, and, through one of its duly-authorized officers, objecting to the payment of this money. For the foregoing reasons, the judgment is reversed, and the cause remanded.

NOTE.—It may be stated as a general proposition within the law applicable to contracts, that the publication of an advertisement offering a reward for information respecting a loss or a crime is a general offer to any person who is able to give the information asked. And the acceptance of it by giving such information creates a valid contract (Williams v. Carwardine, 4 Barn. & Adol. 621; Ryer v. Stockwell, 14 Cal. 134, 73 Am. Dec. 634; Reif v. Page, 55 Wis. 496, 42 Am. Rep. 731; Morrell v. Quarles, 35 Ala. 544; Harson v. Pike, 16 Ind. 140; Pierson v. Morch, 82 N. Y. 503; Janorin v. Exeter, 48 N. H. 83; Besse v. Dyer, 9 Allen, 151, 85 Am. Dec. 747), or the offer may be made orally. Hayden v. Souger, 56 Ind. 42, 26 Am. Rep. 1. But where the offer of a reward is made in a newspaper without authority, the alleged promisor is not estopped from denying his liability, although he knew of the publication and did not object to it. Hugell v. Kinney, 9 Oreg. 250, 42 Am. Rep. 801. The performance of the terms of the offer is a good consideration for the promise (Morrell v. Quarles, 35 Ala. 544), even where the offerer had no interest in the performance of the services. Fuiman v. Parke, 21 N. J. L. 310. It is generally held that a reward cannot be claimed by a public officer whose duty it was to do what the reward offered a premium for doing (Stamper v. Temple, 6 Humph. 113; Hayden v. Souger, 56 Ind. 42, 26 Am. Rep. 1; Pool v. Boston, 5 Cush. 219; Means v. Hendershott, 24 Iowa, 78; Gilmore v. Lewis, 12 Iowa, 281; Hatch v. Mann, 15 Wend. 44; City Bank v. Banks, 2 Edw. Ch. 95; *In re* Russell, 51 Conn. 577, 50 Am. Rep. 55), but it must be clear that the matter was within his official duty. Pille v. New Orleans, 19 La. Ann. 274; Gregg v. Pierce, 53 Barb. 387; Davis v. Munson, 43 Vt. 676; Chicago, etc. R. Co. v. Sebring, 16 Ill. App. 181. Under a statute giving a reward to "whosoever shall pursue and apprehend" any person who had stolen a horse, the owner of the horse is entitled thereto. Butler Co. v. Leibold, 107 Pa. St. 407. But one who assists a prisoner to escape, cannot recover a reward offered for information of the prisoner's hiding place, if he conceals the fact of his own aiding. Hassan v. Doe, 38 Me. 45. The offer is of course a mere proposal, and may be revoked at any time before acceptance by performance. Cunningham v. Gann, 52 Pa. St. 484; Harson v. Pike, 16 Ind. 140. In Massachusetts it is held that an offer is only in force for a reasonable time after it is made (Loring v. City of Boston, 7 Metc. 409), while in other cities it has been ruled that the offer continues open until it is revoked. Ryer v. Stockwell, 14 Cal. 134, 73 Am. Dec. 634; *In re* Kelley, 39 Conn. 159. But it may be withdrawn at any time, and the fact that an individual who claims for services afterwards performed under it did not know of the withdrawal when he entered the service, is immaterial. Shuey v. United States, 92 U. S. 73. There is a conflict in the cases on the question whether it is necessary that a person claiming a reward should have had notice at the time he performed the service that the reward had been offered, some decisions maintaining that it is. Howland v. Lounds, 51 N. Y. 604; Merrion v. Treat, 37 Conn. 96; Hewitt v. Anderson, 56 Cal. 476. Other decisions hold that it is not. Dawkins v. Sappington, 26 Ind. 199; Crawshaw v. Roxbury, 7 Gray, 377; Russell v. Stewart, 44 Vt. 170. The offerer may annex any condition he chooses, and one claiming a reward must prove a compliance with them. Amis v. Connor, 43 Ark. 337; Austin v. Milwaukee County, 24 Wis. 278; Burke v. Wells, 50 Cal. 218; Kincaid v. Eaton, 98 Mass. 139. Thus, where one offers a sum of money for the arrest of two persons, both must be arrested before the reward can be claimed. Blain v. Pacific Express Co., 69 Tex. 74. See 44 Cent. L. J., page 58, for a collection of the cases upon the subject of the liability of municipal corporations for rewards offered, together with the case of City of Winchester v. Redmond (Va.), wherein the same question is considered. In a very recent case, Witty v. Southern Pacific Co., 76 Fed. Rep. 217, decided by the United States Circuit Court for the Southern District of California, it appeared that three men, in search of certain criminals for whose arrest a reward had been offered, fired upon and wounded one of them, who was concealed behind a pile of straw, so that the extent of his injuries was unknown. One of the attacking party, being also wounded, was conveyed to a distant town by another, who returned next morning, accompanied by a deputy sheriff and others. The third member of the original party remained on watch near the straw pile all night to prevent the criminal's escape. The deputy sheriff, with other persons, approached the straw pile, and finding the wounded man utterly incapable of offering the least resistance, formally arrested him. It was held that the arrest was in fact effected before the deputy's arrival, and the latter was not entitled to claim the reward, and that it is the duty of a deputy sheriff, when specific information is conveyed to him that a felon is at a particular place within his jurisdiction, to take measures for his prompt apprehension, and he cannot claim that an arrest thus effected is made in his private capacity so as to entitle him to a reward offered by private parties. The court distinguished Russell v. Stewart, 44 Vt. 170, and followed Warner v. Grace, 14 Minn. 487 (Gil. 364). It appeared also in the case that on the day after the arrest the deputy stated to an agent of defendants that only those who made the fight were entitled to the reward, and that he himself would not claim any part of it. Thereupon the entire amount was paid to the searching party. It was held that the deputy was estopped from thereafter claiming the reward for himself. Other very recent cases on the same subject are: One who receives compensation from a water company for reporting a pollution of its source of supply, and the offender's identity, in compliance with the company's request for such information, cannot afterward procure the offender's conviction and claim a reward offered "for the arrest and conviction" of such offenders, since the reward cannot be apportioned, and acceptance of pay for the detection defeats a recovery for the conviction. Van Horn v. Ricks Water Co., 115 Cal. 448, 47 Pac. Rep. 361. One's right to a reward offered by the governor under St. sec. 1932, for appre-

hension and delivery of a fugitive from justice, is not affected by the fact that the apprehension was prior to the offer, the delivery to the county officer not being made till after the offer. Coffey v. Commonwealth (Ky.), 37 S. W. Rep. 575. Where an offer of a reward was made "for information leading to the arrest and conviction" of any person driving off cattle, the person who furnished the "information" leading to the arrest, and not the sheriff who makes it, is entitled to the reward. Ward v. Keystone Land & Cattle Co. (Tex. Civ. App.), 38 S. W. Rep. 532.

BOOK REVIEWS.

THE LAW OF MINES AND MINING IN THE UNITED STATES.

Practitioners in the line of which this work treats will doubtless give it a hearty welcome, as it is the first exhaustive treatise on that distinctive branch of jurisprudence pertaining to the rights and duties of miners and mine owners. Its comprehensive character may be best understood in the statement that it has nearly nine hundred pages of almost solid text, in which every conceivable phase of the subject of mining law seems to find treatment. In successive chapters are discussed the following: Property in minerals where there has been no division between the ownership of the surface and the mineral estate; property and rights in minerals where the title to the minerals or the right to take them is vested in some one who is not the owner of the soil; mining leases, rights and duties arising thereunder; assignment and termination of lease; property of the sovereign and its grantees in minerals; the government's title and the grant thereof; discovery and location of claims; the extent of the claim; how mining claims are held; local mining rules and regulations; how title to mining claims may be terminated; the possessory title or title before patent; the patent; different kinds of claims, their special features and characteristics; conflicting government grants; title acquired by statute of limitations; rights of mine owners; water rights; rights of surface and lateral supports; mining on the land of others; equitable principles and remedies in their application to mines; joint ownership of mines; miners; United States statutes land office regulations. The authors of the work are Daniel M. Barringer and John S. Adams of the Philadelphia Bar. It is published by Little, Brown & Co., Boston, Mass.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTION—Tort or Contract.—A count, in trespass on the case, alleging that an agent authorized to collect moneys for plaintiff had collected sums, but that, intending to defraud plaintiff, he neglected and refused to pay said money, and that such refusal is fraudulent and in violation of his duty, is demurrable, since the count shows only an action of contract and not an action sounding in tort.—ROYCE v. OAKES, R. I., 39 Atl. Rep. 758.

2. ADMINISTRATOR — Accounting — Limitations. — So long as money belonging to decedent's estate, and collected by his administratrix, remains in her hands undistributed, the statute does not run against proceedings against her therefor by his heirs.—CONSTABLE v. CAMP, Md., 39 Atl. Rep. 807.

3. ADVERSE POSSESSION—Evidence.—Where parents, after deeding land to children, remained in possession under claim of ownership, occupying and renting the land to some of the grantees more than 20 years, title was reinvested in the parents if the grantees ever had title under the deed.—SCARBORO v. SCARBORO, N. Car., 29 S. E. Rep. 352.

4. APPEAL—Dismissal. — In support of a motion to dismiss an appeal, it may be shown by extrinsic evidence that the controversy between the litigants has ceased to exist.—FRANKLIN v. PEERS, Va., 29 S. E. Rep. 321.

5. APPEAL—Insolvency—Interested Party.—A trustee in insolvency of an estate cannot appeal from a decree of the probate court, refusing to extend the time for presentation of claims to commissioners of said estate.—APPEAL OF WOODBURY, Conn., 39 Atl. Rep. 791.

6. APPEAL — Record — Stipulations. — A stipulation waiving deficiencies in the transcript of record, in that the longhand manuscript was not filed in the office of the clerk prior to its incorporation into the bill of exceptions, as provided by statute, cannot be considered by the appellate court.—DAVIS v. UNION TRUST CO., Ind., 49 N. E. Rep. 817.

7. ASSIGNMENTS FOR CREDITORS — Consideration. — Where a creditor assails an assignment for creditors which prefers another creditor whose claim would absorb the whole estate, the note of the assignor to the latter creditor for the amount of his claim, together with the assignor's testimony that he had given it for borrowed money, sufficiently proves the debt.—BARBER v. BUFFALOE, N. Car., 29 S. E. Rep. 336.

8. ASSOCIATIONS — Withdrawal of Members. — The withdrawal of nearly two-thirds of the members of a voluntary association does not destroy its identity, and the remaining members are entitled to the property.—SCHILLER COMMANDERY, NO. 1, UNITED FRIENDS OF MICHIGAN v. JAENNICHEN, Mich., 74 N. W. Rep. 458.

9. ATTACHMENT—Release by Bond.—Certifying a case to the common pleas division for jury trial does not prevent the clerk of the district court, before final judgment, from releasing an attachment on personal property of the defendant in the hands of trustees, and delivering a certified copy of the writ, with his indorsement thereon, that the property is released,

upon receiving a bond, therefor, as is provided in Gen. Laws, ch. 253, §§ 23-25.—STONE v. PEOPLE'S SAV. BANK, R. I., 39 Atl. Rep. 753.

10. ATTORNEY'S LIEN—Partition. — An allotment of land in partition is not a recovery thereof, so as to entitle an attorney to a lien upon the same for his fee, under Sand. & H. Dig. § 4225, providing that, where a judgment is "the recovery of real estate," the lien shall be an interest in such property to the extent thereof.—GIBSON v. BUCKNER, Ark., 44 S. W. Rep. 1034.

11. ATTORNEY'S LIEN—Setting Apart Homestead.—An application for the setting apart and valuation of a homestead of realty is not a suit for money, nor is it a suit for the recovery of real or personal property, within the meaning of the statute which fixes the liens of attorneys. The applicant has a right to withdraw or dismiss such application at his pleasure, and, if either be done, no lien on the property sought to be exempted exists in favor of an attorney prosecuting such application; nor can he, as against this action of the applicant, further prosecute the same.—HAYGOOD v. DANNENBERG CO., Ga., 29 S. E. Rep. 293.

12. BANKS—Insolvency—Preferences. — The F bank, which sent to the M bank, for collection, a number of checks on the latter, is not entitled to preference, on the M bank becoming insolvent; the M bank having received no money on the checks, but merely charged them on its books against the drawers.—SUNDERLIN v. MECOSTA COUNTY SAV. BANK, Mich., 74 N. W. Rep. 478.

13. BENEVOLENT SOCIETY—Forfeiture of Certificates. —The habit of the financial reporter of a subordinate lodge to receive payments of assessments after the end of the month, within which they were payable under the penalty of suspension and forfeiture of the benefit certificate issued by the supreme lodge, does not constitute a waiver by the supreme lodge, and estop it from insisting on a forfeiture, where it has no knowledge of such habit. — SUPREME LODGE KNIGHTS OF HONOR v. OETERS, Va., 29 S. E. Rep. 322.

14. BENEVOLENT SOCIETY — Insolvency — Rights of Members.—A member of a mutual benefit association, organized under laws of another State, cannot hold property of the association within the State by garnishment proceedings instituted before appointment of receiver in ancillary proceedings in the State, but after appointment of receiver in the other State, though the member's policy matured before the appointment of the receiver in the other State, the proceedings therefor having been begun before such maturity, and though judgment on the policy was had against the association.—WHEELER v. DIME SAV. BANK, Mich., 74 N. W. Rep. 496.

15. BILLS AND NOTES—Accommodation Indorsement. —The Iowa statute having declared that the blank indorsement of a promissory note by one not a payee, indorsee, or assignee thereof is a guaranty of payment (McClain's Code, § 3265), a note bearing such an indorsement is notice to any one discounting it that the indorser is presumably a mere accommodation indorser, without consideration, and hence a mere guarantor. This presumption, however, may be rebutted by showing that such indorser in fact received a consideration.—LYON, POTTER & CO. v. FIRST NAT. BANK OF SIOUX CITY, IOWA, U. S. C. C. of App., Eighth Circuit, 85 Fed. Rep. 120.

16. BILLS AND NOTES—Demand Note.—A demand note is due on the day of its date.—CAUSEY v. SNOW, N. Car., 29 S. E. Rep. 359.

17. BILLS AND NOTES—Guaranty.—Where the trustee of a school township wrote on its note, "The within warrant is O. K., and will be paid promptly when due," and signed his name thereto, such words do not constitute a guaranty, and the trustee is not liable to one who purchased the note on the faith of said written representation.—FOWLER NAT. BANK v. BROWN, Ind., 49 N. E. Rep. 833.

18. BILLS AND NOTES—Promise to Pay in Bonds.—A promise in an instrument to pay $1,000 and interest, "payable in levee bonds of the State of Arkansas," is an absolute condition for payment in such bonds, so that the payee, on the maker's default, is entitled only to damages to the extent of the value of such bonds, and not to the sum of money named, with interest.—JOHNSON v. DOOLEY, Ark., 44 S. W. Rep. 1032.

19. BROKER'S COMMISSIONS — Non-performance of Condition.—Where the condition upon which a broker is to be entitled to commissions is not fulfilled, but performance has not been prevented by the wrongful conduct of the principal, the latter is entitled, in an action by the broker for compensation, to rely upon the fact of non-performance.—HALE v. KUMLER, U. S. C. C. of App., Sixth Circuit, 85 Fed. Rep. 161.

20. BUILDING AND LOAN ASSOCIATIONS—Contracts.—A resident of the State became a member of a Minnesota loan association, and a borrower. Lands in the State were mortgaged to secure the loan. The papers were forwarded to the Minnesota office, and from it the money was forwarded to the borrower. The note purported to have been made in Minnesota, was payable there, recited that it was made with reference to the laws of Minnesota, but was usurious under the laws of the State: Held, that the contract was to be performed in the State, the provision to the contrary being an attempt to evade the usury law.—LOCKNANE v. UNITED STATES SAV. & LOAN CO., Ky., 44 S. W. Rep. 977.

21. CERTIORARI—Supreme and Appellate Courts.—Burns' Rev. St. 1894, § 1362 (Horner's Rev. St. 1897, § 6586), declaring that the appellate court shall be governed by the law as declared by the supreme court, and shall not directly or by implication reverse or modify any decision of the supreme court, and providing for the transfer of any cause to the supreme court when the appellate court is of opinion that a decision of the supreme court controlling the decision to be made in the cause transferred ought to be overruled, does not authorize a writ of *certiorari* to issue from the supreme court to bring a case before it from the appellate court, on the ground that the latter has attempted to overrule a decision of the former, since, in all cases in which the appellate court has jurisdiction, its decisions are final by statute.—NEWMAN v. GATES, Ind., 49 N. E. Rep. 826.

22. CHATTEL MORTGAGES—Filing and Change of Possession.—A chattel mortgage is void as against a debt contracted after its execution and before its filing or change of possession thereunder, though as security for the new debt a mortgage is taken on the chattels which is not properly filed, and possession is not taken by virtue thereof; 2 How. Ann. St. § 6193, declaring that a chattel mortgage, unaccompanied by change of possession, shall, unless filed, be void as against creditors of the mortgagor.—VINING v. MILLAR, Mich., 74 N. W. Rep. 459.

23. CONSTITUTIONAL LAW—Courts — Legislative Powers.—Though Const. art. 4, § 12, authorizing the general assembly to allot and apportion the jurisdiction of the courts below the supreme court, "without conflict with other provisions of the constitution," confers on the legislature power to give to courts created by it original jurisdiction, exclusive or concurrent with the superior court, of any matters heretofore cognizable in the latter court (though not appellate jurisdiction over justices of the peace), it does not empower the legislature to change the *status* of the superior court, which was created as the head of the court system below the supreme court; and hence an appeal to the supreme court will lie only from the superior court. —STATE v. WILMINGTON & W. R. CO., N. Car., 29 S. E. Rep. 335.

24. CONTRACTS — Adoption by Successor.—A contract with a railroad receiver, whereby a coal company was to supply the road with coal for one year at a certain price, stipulated that at the expiration of the year it should be renewable at the option of the coal company. Before that time the railroad was sold under a mortgage given prior to the making of the contract. The

purchasers were aware of the existence of the contract, of the price stipulated therein to be paid for coal, and of the date of its expiration, but did not know of the option clause regarding renewal: Held, that by continuing to receive coal under the contract until notified by the coal company that the contract would be renewed at the expiration of the year, the purchasers did not adopt said option clause.—SLOSS IRON & STEEL CO. v. SOUTH CAROLINA & G. R. Co., U. S. C. C. of App., Fourth Circuit, 85 Fed. Rep. 133.

25. CONTRACTS — Construction — Public Policy.—An agreement by one having a contract with the government to pay an excessive price for labor performed to complete the contract on "the understanding that the government would be soaked," is against public policy and void.—FISHER ELEC. CO. v. BATH IRON WORKS, Mich., 74 N. W. Rep. 493.

26. CONTRACT — Demand.—Where money is due on contract, a demand therefor is not necessary before suit.—BERTHA v. SPARKS, Ind., 49 N. E. Rep. 831.

27. CONTRACT—Evidence.—In an action on a builder's contract, testimony as to the employment by the defendant of architects to prepare the plans, incorporated into the written contract made by him with plaintiff, is immaterial.—HILLS v. TOWN OF FARMINGTON, Conn., 39 Atl. Rep. 795.

28. CONTRACT—Illegal Contracts.—One who sold beer, knowing that it was to be disposed of without a license in violation of the law, cannot recover its price.—TERRE HAUTE BREW. CO. v. HARTMAN, Ind., 49 N. E. Rep. 864.

29. CONTRACT—Validity—Want of Mutuality.—A practically exclusive privilege to sell the goods of a manufacturer, but without any corresponding obligation on the other party to the contract, is invalid for the want of mutuality except in so far as it has been actually performed by the last-named party.—BENJAMIN v. BRUCE, Md., 39 Atl. Rep. 810.

30. COUNTIES—Funding Bonds—Deposit with Bank.—A bank, with knowledge of the order of the county court for issue of bonds to refund certain old bonds, appointing the county treasurer as financial agent, defining and limiting his authority to making a contract with W for the sale of the bonds, or exchange thereof for the old bonds, to receiving the bonds from the county clerk and having them registered and delivered to said bank, and defining the authority and duty of the bank to deliver the bonds to W on payment to it, for the county, of the par value thereof in money or the old bonds, and directing that, if any cash is paid, it shall apply same to payment of the old bonds when later presented, is responsible to the county for the cash if, instead of keeping it for the old bonds, or turning it over to the county, it paid it on the check of the treasurer, who applied same to payment of his official defalcations, or other obligations.—BUTLER COUNTY v. BOATMEN'S BANK, Mo., 44 S. W. Rep. 1047.

31. COUNTIES—Highways—Failure to Levy Tax.—Under Laws 1895, p. 655, §§ 6, 7, requiring a county to pay a town for one-third the cost of constructing a road in the town and county out of any money in the treasury not otherwise appropriated, the town is entitled to a judgment against the county, though it neglected to make a levy therefor, and had no money not otherwise appropriated.—TOWN OF NEW MILFORD v. LITCHFIELD COUNTY, Conn., 39 Atl. Rep. 796.

32. CRIMINAL LAW—Change of Venue.—The power to grant a change of venue is, in great part, confided to the district court. His refusal to change the venue will not be reversed unless it is clearly shown that it was erroneous.—STATE v. BRITTIN, La., 23 South. Rep. 801.

33. CRIMINAL LAW—Perjury.—An indictment charged perjury in an action wherein one "H was plaintiff and Thos. R. Robertson was defendant." The proof showed that "Thomas Robertson" was defendant in said case: Held not a fatal variance, and, where there was evidence of the identity of Thomas Robertson and Thomas R. Robertson, it was for the jury to determine the identity of the persons named, under Code, § 1183, providing that no judgment shall be arrested by reason of any informality or "refinement."—STATE v. HESTER, N. Car., 29 S. E. Rep. 380.

34. CRIMINAL LAW—Petit Larceny.—Though Sand. & H. Dig. § 1694, defines larceny as "the felonious stealing" of the personal property of another, it was not necessary, under section 1699, making petit larceny a misdemeanor, to charge that the taking, etc., was "feloniously" done, in an indictment for petit larceny; and an allegation that defendant "unlawfully did steal," etc., was sufficient.—STATE v. BOYCE, Ark., 44 S. W. Rep. 1043.

35. CRIMINAL LAW—Removing Mortgaged Property.—Under Sand. & H. Dig. § 1868, prohibiting the removal from the county of any property on which there is a mortgage lien, it is unnecessary that the indictment for the removal of such property shall show that the mortgage was recorded or filed for record.—BARNETT v. STATE, Ark., 44 S. W. Rep. 1037.

36. DEATH BY WRONGFUL ACT — Damages.—In action by administrator of an adult for death by wrongful act, substantial damages cannot be recovered on evidence merely of her earning capacity, and life expectancy, and the survival of a father and brothers and sister, but pecuniary loss to them must be shown.—DIEBOLD v. SHARPE, Ind., 49 N. E. Rep. 837.

37. DEATH BY WRONGFUL ACT — Next of Kin.—To maintain an action as next of kin for death by wrongful act, one need not have had a legal claim on deceased for services or support, but it is enough that he had a reasonable expectation of deriving some pecuniary advantage from deceased, which was destroyed by his death.—BOYDEN v. FITCHBURG R. Co., Vt., 39 Atl. Rep. 771.

38. DEED—Construction — Boundaries.—An inconsistent course and distance must give way to a natural object or well-known line of another tract, when called for in the deed.—BOWEN v. GAYLORD, N. Car., 29 S. E. Rep. 340.

39. DEED—Recital.—Evidence that the recital of the payment of the price in a deed was untrue was admissible, as such acknowledgment is not contractual, but is merely a receipt, and therefore only *prima facie* evidence.—MARCOM v. ADAMS, N. Car., 29 S. E. Rep. 338.

40. DEED OF TRUST—Omission to Name Trustee.—J, of the first part, executed and delivered to D, of the third part, a deed to ——, as trustee, of the second part, of certain land, reciting that "the said J, desiring to secure the said D" from loss by the indorsement of certain notes, "doth bargain, sell, and convey unto the said party of the second part, as trustee, in trust to secure said notes," the property described: Held not void because no party of the second part was named.—DULANY v. WILLIS, Va., 29 S. E. Rep. 324.

41. DIVORCE—Petition.—A petition by a wife for divorce alleged that, several years after their marriage, defendant informed her that he had another wife living, but he had procured a divorce from her; that this was the first knowledge she had that he had been married before; and that they then recognized the marriage ceremony which had been previously performed as binding on them: Held, that the court could not say that the petition showed that the marital relations did not exist.—FLANAGAN v. FLANAGAN, Mich., 74 N. W. Rep. 460.

42. DIVORCE—Suit Money and Alimony Pendente Lite.—In an action by a wife for a divorce, an injunction restraining disposition of property by defendant cannot be granted where there are no allegations in the complaint, and no facts stated in affidavits submitted, to show that plaintiff's claim is in danger of being defeated by defendant's disposition of his property.—SMITH v. SMITH, S. Car., 29 S. E. Rep. 227.

43. EASEMENTS—Right of Way.—The owner of land which is subject to a right of way is not bound to keep it in repair in the absence of an agreement.—NICHOLS v. PECK, Conn., 39 Atl. Rep. 803.

44. EJECTMENT—Title—Parol Gift.—Prior possession of land, under a claim of ownership, is *prima facie* evidence of title in the occupant, upon which he may recover in ejectment, unless the defendant shows a better adverse title, by possession or otherwise. Such claim of ownership, if *bona fide*, may be supported by proof of a parol gift from another and entry thereunder, even where such entry was not made until after the donor's death, and although it does not affirmatively appear that the donor had ever been in possession of, or had title to, the property. Such a gift would not pass title to the donee; but it could, nevertheless, be made the basis of an honest possession by the latter, accompanied by a *bona fide* claim of right, which could in time ripen into a perfect title.—ELLIS v. DASHER, Ga., 29 S. E. Rep. 268.

45. EMINENT DOMAIN — Appropriation of Land — Pleading.—Plaintiff, alleging that defendant railroad had appropriated a part of his land, and impaired the value of the remainder, may prove title by limitations without pleading it.—MISSOURI, K. & T. RY. CO. v. WICKHAM, Tex., 44 S. W. Rep. 1023.

46. EQUITY — Railroad Receiverships. — A railroad mortgagee, who comes into the cause after a receiver has been appointed, with the company's consent, on a bill by another creditor, is not in a position to raise the objection that the plaintiff, not being a judgment creditor, had no right to follow the assets of the defendant in equity.—GRAND TRUNK RY. CO. v. CENTRAL VERMONT R. CO., U. S. C. C., D. (Vt.), 85 Fed. Rep. 87.

47. EVIDENCE—Parol Evidence.—Where a deed of trust sets forth with entire clearness the names of the creditors and the amounts of the debts to be paid, and the name of the debtor and the property conveyed as security, and the power and the manner of the application of the proceeds of sale, parol evidence to in any way explain the deed is inadmissible.—CHARD v. WARREN, N. Car., 29 S. E. Rep. 373.

48. EVIDENCE—Parol Evidence—Contract.—When, on the face of a written instrument, it is doubtful whether a person's initials, written by him, were intended to witness an interlineation, or to be incorporated in the instrument as part of the interlineation, a question is presented over which a court of law has jurisdiction, and which may be decided on extrinsic parol evidence. —ISHAM v. COOPER, N. J., 39 Atl. Rep. 760.

49. EVIDENCE—Parol Testimony to Vary Writing.—It is a rule of evidence, quite aside from the statute of frauds, that parol testimony of a contemporaneous oral agreement or understanding, not included in the written contract, is inadmissible to contradict, vary, add to, or subtract from the terms thereof, when such contract is complete in itself and unambiguous in its terms. This rule is strictly enforced by the Michigan courts.—REID v. DIAMOND PLATE-GLASS CO., U. S. C. C. of App., Sixth Circuit, 85 Fed. Rep. 193.

50. EXECUTION—Exemptions—Materials Furnished.—A steam engine and boiler sold and delivered to a corporation, and not necessary to keep the company going, are not "materials furnished," within Code, § 1255, providing that mortgages of incorporate property shall not exempt the property from execution in satisfaction of judgments for materials furnished such incorporation.—JAMES v. GREENVILLE LUMBER CO., N. Car., 29 S. E. Rep. 358.

51. FEDERAL COURTS—Jurisdiction of Supreme Court. —A decision by a State supreme court that the procedure by which a State officer has been suspended or removed from office by the governor was regular, and pursuant to a valid State statute, is not reviewable by the federal supreme court, unless fundamental rights protected by the federal constitution have been infringed.—WILSON v. STATE OF NORTH CAROLINA, U. S. S. C., 18 S. C. Rep. 435.

52. FRAUDS, STATUTE OF.—An agreement on the part of a wife to pay the debt of her husband is invalid unless in writing.—GOODMAN v. FELCHER, Mich., 74 N. W. Rep. 511.

53. FRAUDS, STATUTE OF—Pleading.—Where defendant's grantor, in a suit to enforce a parol trust in respect to the land, denies the existence of the trust, it cannot be enforced, even though defendant has failed to set up the statute of frauds.—ROGERS v. ROGERS, R. I., 39 Atl. Rep. 755.

54. GAMING—Wagers — Note. — Under Code, §§ 2841, 2842, declaring that all bets shall be unlawful, and that all contracts on account of money or property wagered shall be void, a note given in consideration of a bet won on a horse race could not be enforced, though given in a State in which such contracts are valid.—GOOCH v. FAUCETT, N. Car., 29 S. E. Rep. 362.

55. GIFT. — There is no gift where one deposits her money in a savings bank in the joint names of herself and another, and there is written on the bank books, "Either party to draw, and, in case of death of either of them, the survivor shall have full power to withdraw the deposit as if the same had been duly transferred to such survivor."—FLANAGAN v. NASH, Penn., 39 Atl. Rep. 818.

56. GUARANTY — Construction — Breach. — Where a member of a building and loan association received a sum of money as an advance on his shares of stock, and entered into an obligation undertaking to pay monthly a certain sum as dues on the stock advanced upon, and a further monthly installment of interest and premium on the advance, the contract also stipulating for the continuance of such monthly payments as long as the association should continue to exist, or as provided in the by-laws; and where, in addition to a deed to land which the member had executed as security for his performance of these undertakings, he also furnished the association the bond of a third person in a penal sum, conditioned "that such member should promptly pay the installments of stock, interest, and premium first falling due under his obligation to the amount of four hundred dollars," such obligation was a special guaranty, and was broken *pro tanto*, whenever the member failed to pay any installment included in the sum of $400 as an aggregate of the monthly installments first maturing under the contract.—GEORGIA STATE BUILDING & LOAN ASSN. v. AMERICAN INVESTMENT & LOAN CO., Ga., 29 S. E. Rep. 299.

57. GUARDIAN'S BOND—Release of Sureties.—A guardian's original bond is not discharged by the filing of a second bond, required by laws of the United States before he could receive pension money for the wards. —RUSH v. STATE, Ind., 49 N. E. Rep. 839.

58. HOMESTEADS—Right to Select—Duty of Appraisers.—Under Const. art. 10, § 2, giving a judgment debtor the right to select his homestead, and Code, § 503, providing that the appraisers shall lay off "such portion as he may select," it was error to dismiss the exceptions of defendant to the allotment of his homestead, on the ground that the appraisers gave him no opportunity to make such selection, where such exceptions were, by agreement with plaintiff, taken as true, though his selection thereof included lands to which he disclaimed having any title. — MCGOWAN v MCGOWAN, N. Car., 29 S. E. Rep. 372.

59. HOMESTEAD—Validity—Head of Family.—Where a widower and his adopted daughter and her husband lived together in his house, and form one household, of which he was the recognized head, he is entitled to a homestead exemption. — WAGENER v. PARROTT, S. Car., 29 S. E. Rep. 240.

60. INJUNCTION—Parties.—Citizens of a town may sue to enjoin a turnpike road company from imposing a toll which the charter of the company specially exempts them from paying.—LOUISVILLE & T. TURNPIKE ROAD CO. v. BOSS, Ky., 44 S. W. Rep. 981.

61. INSURANCE—Misrepresentations.—Under the provisions of the Code of this State, misrepresentations by the assured, whether fraudulent or otherwise, as to the value of the property insured, but which do not in any manner affect the risk, will not, except in case of "valued" policies, avoid a policy of insurance; and a plea setting up such misrepresentations as a defense

against a suit instituted upon a policy, according to the terms of which the amount of recovery is open, after loss, to judicial inquiry, should be stricken on demurrer.—ROSSER v. GEORGIA HOME INS. CO., Ga., 29 S. E. Rep. 286.

62. INSURANCE — Waiver of Conditions.—An agent of defendant insurance company gave insured permission to leave his house vacant for a time. Two months thereafter the house burned, and plaintiff notified the agent, who later told him that the company would not pay the loss. Neither the company nor the agent notified plaintiff, nor was he otherwise informed, that the agency had been terminated since the issuing of the policy: Held that, as no notice was given, defendant could not disavow the acts of its agent after the agency was claimed to have been terminated.—WILSON v. COMMERCIAL UNION ASSUR. CO. OF LONDON, ENGLAND, S. Car., 29 S. E. Rep. 245.

63. JUDGMENT—Error in Name.—Under Rev. St. 1889, § 2113, providing, *inter alia*, that no judgment shall be affected by any mistake in the name of the party if his proper name has been once rightly stated in any of the pleadings, a defendant who is misnamed in the petition, but who appears in his right name, and makes defense on the merits is bound by the judgment.—STATE v. BARR, Mo., 44 S. W. Rep. 1045.

64. JUDGMENT — Equitable Assignment.—An assignment of a judgment was not made as provided by statute, but it was shown that the judgment creditor assigned for the benefit of creditors all his property, and the assignee sold and executed a written assignment to plaintiffs of the judgment in controversy, by order of court. A witness testified that he purchased the account and judgment as agent for plaintiffs. It did not appear that the assignor had any creditors who had not been paid from the assignment. The assignee had made a final settlement of his trust without objection. The judgment creditor testified he had no interest in the judgment: Held, that the plaintiffs were equitable owners of the judgment, and hence had a right to sue thereon.—SNELL v. MADDOX, Ind., 49 N. E. Rep. 856.

65. LANDLORD AND TENANT—Repairs.—In the absence of contract, a landlord is not bound to repair, so as to be liable to a member of the lessee's family injured by the falling of a mantelpiece.—CLYNE v. HOLMES, N. J., 39 Atl. Rep. 767.

66. LIMITATIONS—Action by Heirs.—Limitations begin to run against an action by the heirs to recover possession from an adverse holder of a homestead abandoned by the widow, and of which they had notice, not from the widow's death, but from the time it was abandoned by her.—KILLEAM v. CARTER, Ark., 44 S. W. Rep. 1032.

67. LIMITATIONS — Burden of Proof.—Under a plea of limitations, the burden is on plaintiff to show that the cause of action accrued within the time limited.—HOUSE v. ARNOLD, N. Car., 29 S. E. Rep. 334.

68. MANDAMUS — Levy to Tax.—On an application for *mandamus* to compel the levy of a tax to pay a judgment, no questions affecting the validity of the bonds on which the judgment is founded, or the validity or correctness of the judgment itself, are open to consideration.—FLEMING v. TROWSDALE, U. S. C. C. of App., Sixth Circuit, 85 Fed. Rep. 169.

69. MANDAMUS TO STATE TREASURER—State Government.—Code, § 3373, provides that costs in civil actions, brought by or against any State officer, when such action is brought or defended pursuant to the attorney general's advice, and is decided against such officer, shall be paid by the State treasurer. Section 742 provides that costs incurred by any county in prosecuting charges of bribery against any State officer, etc., shall be paid in like manner: Held, that costs taxed against the State in other actions than those specified, brought in its name by its permission, are not "expenses of the State government," within Acts 1897, ch. 198, § 1, providing that certain taxes shall be applied to the payment of "the expenses of the State government."—GARNER v. WORTH, N. Car., 29 S. E. Rep. 364.

70. MASTER AND SERVANT—Defective Tools.—A hickory handle of a hammer broke while used by an employee, and he was injured. He had not used the hammer before that day, and did not know that the wood was worm eaten. Other employees had put the handle in the hammer on the previous day. The employer had owned the handle for a time during which handles of like character commonly become worm eaten, and a careful inspection of it would have revealed its defects: Held, that the employer was liable.—BALTIMORE & O. S. W. RY. CO. v. AMOS, Ind., 49 N. E. Rep. 854.

71. MASTER AND SERVANT — Wrongful Discharge.—Where a contract is made for the performance of labor for a specific time, and the servant is discharged before the end of the time of hiring, he is entitled to recover his wages for the period agreed on in the contract, less such sum as he may have received from defendant and others during the time covered by the contract.—SPAHN v. WILLMAN, Del., 39 Atl. Rep. 787.

72. MASTER AND SERVANT—Negligence—Defective Appliances.—In a suit for damages by a station agent of a railroad company against it for injuries he had sustained while attempting to set a defective brake on one of its cars, the petition does not fail to state a cause of action because it does not aver that the railroad company knew of the defective condition of the brake, or that the brake had been out of repair for such a length of time that the railroad company, by the exercise of ordinary care, could have discovered its defective condition.—CHICAGO, ETC. R. CO. v. KELLOGG, Neb., 74 N. W. Rep. 454.

73. MASTER AND SERVANT — Negligence — Proximate Cause.—Defendant company built in its mining shaft a platform for its employees to pass over. The explosion of a blast in the mine tore up the planks. Soon afterwards its shift boss put the planks in place, and immediately afterwards plaintiff, one of its employees, went on the platform, when one of the loose planks turned, and he fell through the platform and was injured: Held, that if the planks were not spiked before the explosion, and would not have been loosened if hey had been spiked, the defect in the original construction was the proximate cause of the injury.—SMEIZEL v. ODANAH IRON CO., 74 N. W. Rep. 488.

74. MECHANIC'S LIEN — Railroads.—Under Rev. St. 1894, § 7265, providing, *inter alia*, that all persons who perform work of any kind in the construction or repair of a railroad, whether under a contract with the railroad or with a contractor or subcontractor, shall have a lien upon the right of way and franchises of such railroad, a laborer who performs work for a contractor in digging a well at the stock yard owned by a railroad company is entitled to a lien for the amount due him for his labor.—WABASH R. CO. v. ACHEMIRE, Ind., 49 N. E. Rep. 835.

75. MECHANIC'S LIEN—Railroad Improvements.—A mechanic and material man who did work and furnished materials in building section houses for a railroad company did not, under section 1979 of the Code of 1882, acquire a lien on any of the property of the railroad company, when the contract for such work and materials was not made with that company, but with another corporation (a construction company), which had contracted with the railroad company to do such work and furnish such materials, and when there was no attempt to obtain such lien by giving the railroad company, as the true owner of the property, the notice which that section required.—SPARKS v. DUNBAR, Ga., 29 S. E. Rep. 295.

76. MORTGAGES — Dower—Inchoate Right.—A wife, during coverture, has no right to have her inchoate right of dower ascertained and protected in the proceeds of sale under a mortgage upon land that was owned by her husband.—GRUBE v. LILIENTHAL, S. Car., 29 S. E. Rep. 230.

77. MORTGAGES — Foreclosure — Sale.—Under Rev. Code 1893, ch. 111, § 29, authorizing the court to require

the sheriff in office to make a deed to the purchaser at foreclosure sale, where the officer making the sale is out of office, and the purchase money has been paid "without a deed being made pursuant to such sale," the court may order a deed to be executed to remedy a defect in a previous sheriff's deed.—IN RE DEPUTY, Del., 39 Atl. Rep. 790.

78. MORTGAGES—Laches — Foreclosure.—When the legal right of action upon a bond is barred by the statute of limitation, and the legal right of entry upon lands mortgaged to secure the bond is likewise barred, the holder of the bond and mortgage cannot maintain a bill in chancery to collect the debt by sale of the mortgaged premises, unless he can show some pertinent equitable right beyond the ownership of the bond and mortgage.—BLUE v. EVERETT, N. J., 39 Atl. Rep. 765.

79. MUNICIPAL CORPORATIONS—Electric Light Plants.—Under Const. art. 7, § 7, prohibiting municipal corporations from contracting debts or laying taxes, except for necessary expenses, unless by a majority vote of the qualified voters, such a corporation, having general powers merely, cannot issue bonds for the erection of an electric light plant for lighting its streets, without legislative authority to submit the proposition to the voters and a ratification by a majority vote thereof.—MAYO v. TOWN OF WASHINGTON, N. Car., 29 S. E. Rep. 343.

80. MUNICIPAL CORPORATIONS — Contracts.—Where one R contracted with a city council to build a city hall and to furnish all the material, such council was not made liable, to one who sold R lumber for such building, by the mere verbal assurance of the mayor that the amount would be paid out of the funds due R when the next installment became payable, in the absence of any authority given the mayor by the council to give such assurance.—WILLOUGHBY v. CITY COUNCIL OF CITY OF FLORENCE, S. Car., 29 S. E. Rep. 242.

81. MUNICIPAL CORPORATION — Streets—Negligence.—There was no crosswalk on one side of a street, but a beaten pathway only. Within a few feet of this path was an open ditch about 20 inches deep, and plaintiff, while attempting to cross the street on a dark night, got off the path and fell into the ditch. There was a crosswalk on the other side of the street, which plaintiff was aware of, and could have used with safety: Held, that the court erred in directing a verdict for defendant.—COMISKIE v. CITY OF YPSILANTI, Mich., 74 N. W. Rep. 487.

82. NATIONAL BANKS—Impairment of Capital—Assessment of Stock.—On notice from the comptroller, under Rev. St. § 5205, that the bank's capital is impaired so as to require an assessment on the stockholders, such assessment is to be made by the stockholders themselves, and an assessment by the directors is void.—HULITT v. BELL, U. S. C. C., S. D. (Ohio), 85 Fed. Rep. 98.

83. NEW TRIAL—Newly-Discovered Evidence.—On appeal from an order denying a new trial asked on the ground of newly-discovered evidence, where the evidence given at the trial is not before the court, the evidence claimed to be newly discovered will not be considered.—COOPER v. BARTLETT, Ind., 49 N. E. Rep. 827.

84. NEW TRIAL—Presumptions.—Where the trial court sets aside a verdict and grants a new trial, all reasonable presumptions will be indulged in favor of the correctness of its action.—LOOMIS v. PERKINS, Conn., 39 Atl. Rep. 797.

85. OFFICERS—Removals.—Under Rev. St. § 3148, providing that the collector of internal revenue may appoint his deputies and remove them by giving such notice as the commissioner of internal revenue may prescribe, the rules of the commissioner have no such authority as law that a deputy collector can invoke the equitable interference of the courts to restrain his removal in violation of them.—PAGE v. MOFFETT, U. S. C. C., D. (N. J.), 85 Fed. Rep. 38

86. PAROL EVIDENCE — Insurance — Misdescription—Estoppel.—An insurance company is estopped to rely on a misdescription of the property, when the application was prepared by its agent, who had authority to issue the policy, and who knew the actual facts concerning the property.—GLOVER v. NATIONAL FIRE INS. CO. OF BALTIMORE, U. S. C. C. of App., Fourth Circuit, 85 Fed. Rep. 125.

87. PARTNERSHIP—Death of Partner—Surviving Partner.—On the death of a partner, a survivor has the right to continue the business only long enough to close it out without sacrificing it, and such survivor dying within six months cannot confer on his executor the right to continue the business for a series of years as a going concern.—FRY v. EISENHARDT, Mich., 74 N. W. Rep. 501.

88. PAYMENT—Evidence.—In an action to foreclose a mortgage executed to deceased by defendant to secure a note, it was not error to refuse to find that the note was paid, where, according to two witnesses, defendant admitted, after deceased's death, that he still owed something, and the proofs showed that there were several notes against defendant held by deceased, and after his death at least two notes secured by mortgage could not be found among his papers, and the witnesses for defendant were uncertain as to what note due by defendant to deceased was referred to when deceased referred to a note as paid.—MARTIN v. FOWLER, S. Car., 29 S. E. Rep. 261.

89. PAYMENT OF NOTE—Evidence.—Notwithstanding possession of note by agent of payee, a finding that it had been paid is sustained by conclusive evidence that others of the same series, also in his possession, had been paid, his declaration that there was nothing due on the land in payment of which the notes had been given, and the fact that nothing was said about it for seven years, and till after death of a person who had agreed to pay it, and had ample means therefor.—MCGREGOR v. SIMA, Tex., 44 S. W. Rep. 1021.

90. PLEADING—Limitations.—Where defendant pleads limitations, plaintiff may prove a new promise made after the debt was created, without alleging it in a special replication.—LEVY v. GILLIS, Del., 39 Atl. Rep. 785.

91. POSTAL LAWS—Non-mailable Matter.—Rev. St. § 3893, as amended September 26, 1888 (25 Stat. 496), being construed in the light of the evil to be suppressed, makes non-mailable every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, as being similar to those specifically named, and like those in being obscene, lewd, or lascivious in character.—TIMMONS v. UNITED STATES, U. S. C. C. of App., Sixth Circuit, 85 Fed. Rep. 204.

92. PRINCIPAL AND AGENT—Conversion.—Where parties shipped goods to another who was to sell them, and remit the proceeds to the consignors, the net profit to be applied on a pre-existing debt owing them by the consignee, the transaction was not a purchase, the consignee being an agent merely.—BARNES v. DARBY, Tex., 44 S. W. Rep. 1029.

93. PRINCIPAL AND AGENT — Factors — Holding Consignment.—A factor who has advised the sale of a consignment of meal, and has informed the consignor of the weak condition of the market, by holding the consignment in accordance with the directions of the consignor, does not become liable for failure to use diligence, merely because he afterwards sells the same on a low market.—CHARLOTTE OIL & FERTILIZER CO. v. HARTOG, U. S. C. C. of App., Fourth Circuit, 85 Fed. Rep. 150.

94. RAILROAD COMPANY — Negligence — Accident at Crossing.—A railroad company operating in the usual and ordinary manner a hand car on which were bright, glistening tools used by the employees in performing their duties, is not liable for injuries resulting from a horse driven on a public highway becoming frightened thereat.—LAKE ERIE & W. R. CO. v. JUDAY, Ind., 49 N. E. Rep. 843.

95. RAILROAD COMPANY—Contributory Negligence.—Where, in an action against a railroad company to recover damages for personal injuries by the running of a locomotive and cars within the limits of a city, it appears that such locomotive and cars were running within the limit of speed lawfully prescribed by the city, and it also appears from the evidence of the plaintiff himself that, having previously seen the moving train approaching the crossing, he miscalculated the time in which he could safely cross, and placed himself on the track immediately in front of the moving locomotive, was caught by the pilot, and injured, such injury is directly attributable to the negligence and want of ordinary care on the part of the plaintiff, which bar his right of recovery.—SOUTHERN RY. CO. v. BLAKE, Ga., 29 S. E. Rep. 288.

96. RAILROAD COMPANY — Negligence.—In an action for injuries by a collision between defendant's train and a vehicle driven by the owner, in which plaintiff was riding by such owner's invitation, the court charged that if plaintiff had no control over the team, and she and the driver were each independent of the control of the other, and defendant was guilty of any negligence, it was liable to plaintiff, whether or not the driver was negligent: Held, that such instruction was not proper without the qualification that plaintiff must be free from contributory negligence.—ATLANTIC & D. R. CO. v. IRONMONGER, Va., 29 S. E. Rep. 319.

97. RAILROAD COMPANY — Negligence and Contributory Negligence.—Plaintiff was riding in the daytime in a covered buggy with the owner and driver of the team. When 25 feet from the crossing, the cars could have been seen approaching for 700 feet, but at a greater distance the view was obstructed. At points 270 feet and 65 feet south of the track plaintiff and the dirver looked and listened for a train, and then proceeded across the track, where they were struck by a train not giving any warning of its approach, except a whistle one half mile away for the station. A number of persons in full view of plaintiff were gesticulating to warn her of her danger, but she did not see them: Held, that she was guilty of contributory negligence.—AURELIUS v. LAKE ERIE & W. R. Co., Ind., 49 N. E. Rep. 857.

98. RAILWAY MORTGAGES — Foreclosure Sale.—An assignee of all the rights and title of the purchasers at a railway foreclosure sale, who is admitted as a party to the proceedings, as a substitute for the purchasers, may be heard on any question affecting the purchasers' bid, but cannot question any part of the decree of foreclosure under which it obtained its title.—BALTIMORE TRUST & GUAR. CO. v. HOFSTETTER, U. S. C. C. of App., Sixth Circuit, 85 Fed. Rep. 75.

99. REMOVAL OF CAUSES—Jurisdiction.—After removal, and the argument and overruling in the federal court of a demurrer to the complaint, the plaintiff may still move to remand on the ground that that court has no jurisdiction to hear and determine the cause.—CITY OF MUNCIE v. LAKE ERIE & W. RY. CO., U. S. C. C., D. (Ind.), 85 Fed. Rep. 1.

100. REMOVAL OF CAUSES—Receiver of National Bank.—The rule that, in order to warrant the removal of a cause to the circuit court on the ground that it arises under the laws of the United States, that fact must be shown in the plaintiff's pleading, does not operate to prevent a removal, where the original pleading alleges that defendant is a national banking association, and where a receiver thereof, appointed by the comptroller of the currency, is subsequently made a defendant and petitions for removal.—SPECKART v. GERMAN NAT. BANK, U. S. C. C., D. (Ky.), 85 Fed. Rep. 12.

101. SALE—Conditional Sales.—Title to personal property sold on condition remains in the seller until condition is complied with, so that on breach of condition he is entitled to recover the property.—WILLIAMS v. WILLIAMS, Miss., 28 South. Rep. 291.

102. SALE — Conditional Sales—Title in Vendor.—Under a contract for sale of personal property, where a portion of the price was paid and notes were given for the balance, in which it was provided that title should remain in the vendor until such price was fully paid; that in case of default all of such notes should, at the option of the vendor, become due, whereupon such property might be taken back by the vendor, in which event all payments made should be deemed to be for the use and wear and tear of such property to the time of such retaking; and that no suit on such notes should be a waiver of the vendor's title to such property,—such vendor was not entitled, after having retaken such property, on default by the purchaser, and applied the payments made to that time as payments for the use and wear and tear of the property, to also recover on such notes.—PERKINS v. GROBBEN, Mich., 74 N. W. Rep. 469.

103. SALES—Failure to Remove Property—Forfeiture.—The right to recover timber, under a contract of sale providing that the purchaser is to have four years within which to remove it, is not forfeited by failure to remove it within such period, where there is no forfeiture clause in the contract.—HALSTEAD v. JESSUP, Ind., 49 N. E. Rep. 821.

104. SALE—Refusal to Accept—Damages.—The measure of damages for a breach of contract by refusal to accept goods bought is the difference between the contract price and the market price at the time and place where the tender was made and acceptance refused.—DILL v. MUMFORD, Ind., 49 N. E. Rep. 861.

105. STOCK—Validity—Injunction.—An injunction was properly granted to restrain defendants from selling or exercising acts of ownership over certificates of stock in a railroad corporation, where the order authorizing the issue of the stock was afterwards revoked by the railroad commission, on the ground that the total amount of stock exceeded the value of the railroad property, which is prohibited by Rev. St. 1895, art. 4584g, and the stock was never registered in the office of the secretary of state at the instance of the railroad commission, as required by said article, and such certificates of stock were therefore void under article 4584k.—DAVIS v. SAN ANTONIO & G. S. RY. CO., Tex., 44 S. W. Rep. 1012.

106. TAXATION —Collection—Sale of Debts. — Under Code 1892, § 3826, which authorizes the sale of debts due to a delinquent taxpayer, the tax collector may sell debts due for daily wages, such debts being taxable.—WHITE v. MARTIN, Miss., 28 South. Rep. 289.

107. TAXATION—License Tax—Action to Recover.—An action to collect a tax imposed on the business of selling pianos and organs, by Pub. Laws 1895, ch. 116, § 25, may be brought in the name of the State treasurer alone, since the tax is payable directly to him; and Code, § 3359, provides that he may sue for all money and property of the State not held by some person under authority of law.—WORTH v. WRIGHT, N. Car., 29 S. E. Rep. 361.

108. TAX TITLE—Lien.—In the absence of statute, the purchaser of an invalid tax title does not acquire the lien of the State by his purchase.—CROSKERY v. BUSCH, Mich., 74 N. W. Rep. 464.

109. TELEPHONE COMPANY — Federal Statute — Local Ordinance.—A telephone company operating its lines in and through several States, and in particular over the streets of a city, under the authority of a city ordinance which, by its terms, was revocable by the city, duly complied with the requirements of Rev. St. §§ 5266, 5268, and thereby acquired the rights granted thereby. Thereafter the local ordinance was revoked: Held, that its previous acceptance of the terms of the ordinance did not debar it from claiming the full rights conferred by the act of congress.—CITY OF RICHMOND v. SOUTHERN BELL TEL. & TEL. CO., U. S. C. C. of App., Fourth Circuit, 85 Fed. Rep. 21.

110. TRESPASS.—Trespass on the case will not lie for money had and received for plaintiff's use.—RILEY v. LA RUE, R. I., 39 Atl. Rep. 758.

111. TRESPASS—Possession.—One cannot be guilty of forcible trespass, where the owner of the land is not

in actual use and enjoyment of the same, using it for such purposes as it is capable of.—STATE v. NEWBURY, N. Car., 29 S. E. Rep. 367.

112. TRIAL—Verdict.—Where a jury, by consent, returned a verdict, responding to all the issue submitted, to the clerk, and separated, after court had adjourned, until next morning, which verdict was recorded by the clerk when returned, they cannot be recalled in the morning, and allowed to change their verdict as to any of the issues.—MITCHELL v. MITCHELL, N. Car., 29 S. E. Rep. 367.

113. TRUSTS—Construction.—N is in nowise the beneficial owner under deed to him, "in trust, however, for the sole and separate use, benefit, and behoof of his children," though it is declared that he "is authorized and empowered to use the rents, issues, and profits in educating and supporting said children."—NEAL v. BLECKLEY, S. Car., 29 S. E. Rep. 249.

114. TRUSTS — Following Funds.—Where an executor and trustee under a will probated in the surrogate's court of New York was found, in a compulsory accounting in that court, to be indebted in a certain sum to a devisee under the will, and the trustee invested said sum in land in New Jersey in his own name, and transferred title to his wife, the devisee was entitled to have said sum declared a lien on the land, without first obtaining a personal money judgment against the trustee in New Jersey.—LAWS v. WILLIAMS, N. J., 39 Atl. Rep. 761.

115. USURY—Penalty.—Act 1882, § 1 (18 St. at Lage, p. 36), amending Gen. St. § 1288, fixes the legal rate of interest, and provides that no recovery can be had for any portion of interest unlawfully charged, but the principal shall be deemed the legal debt, to be recovered without costs. Section 2 provides that any person receiving a greater rate of interest than that provided for in section 1 shall, in addition to the forfeiture therein provided, forfeit also double the sum so received, to be allowed as a counterclaim to any action for the principal: Held, that receiving unlawful interest after maturity of a bond forfeits all interest after maturity, together with double the difference between the legal rate and the rate charged, and costs.—EHRHARDT v. VARN, S. Car., 29 S. E. Rep. 225.

116. VENDOR AND PURCHASER.—Where one agrees to purchase from another the timber growing upon a tract of land, and, in pursuance of such agreement, is permitted by the seller peaceably to enter and appropriate the timber thereon to his own use, he cannot, in the absence of fraud or other circumstance justifying a repudiation by him of such agreement, after having so enjoyed the fruits of it, defeat an action for the recovery of the purchase price by showing that, at the time the agreement to purchase was made, he already held paramount title to the land in question.—HARRIS v. AMOSKEAG LUMBER CO., Ga., 29 S. E. Rep. 303.

117. VENDOR AND PURCHASER—Representations of Agent.—One purchasing property from an agent, who represents it to be his own, and whose possession is lawful, has the right to presume that he is the owner, in the absence of reasonable ground for believing otherwise; and dealings between them in that capacity will bind the principal.—CONNALLY v. MCCONNELL, Del., 39 Atl. Rep. 778.

118. WARRANTY — Life Estate—Liability of Owner.—The purchaser of land from the life tenant and the remainder-man cannot maintain an action for breach of warranty against the heirs of the tenant by reason of the remainder man's heirs setting aside the conveyance so far as the remainder is concerned, on the ground that the privy examination of their ancestor, a *feme covert*, was not taken, where the purchaser enjoyed possession until after the death of the owner of the life estate.—ROSS v. DAVIS, N. Car., 29 S. E. Rep. 338.

119. WILLS—Competency of Testator — Undue Influence.—Where testator retained personal charge of his property, managing it with good judgment and discretion, for four years after the making of his will, and the evidence showed, without contradiction, that he clearly comprehended the nature and extent of his property and business, and who were his relatives and heirs at law, instructions to the effect that there was no evidence of mental unsoundness on the part of testater at the time he made such will should have been given.—PENINSULAR TRUST CO. v. BABKER, Mich., 74 N. W. Rep. 509.

120. WILLS—Construction—Nature of Estate.—A husband and wife executed a will giving "our landed estate" to their son for life, with remainder to his heirs, and, if he died without heirs, to their daughter E or her heirs, in consideration that the son support them and their daughter A during the testators' lives, and that A was to have her support out of the land during her life. The son accepted the instrument, agreed to its terms, and went into possession of the land: Held, that no estate vested in the son until the death of testators, whether he was in possession under such instrument or under a similar verbal contract.—ANDREWS v. ANDREWS, N. Car., 29 S. E. Rep. 351.

121. WILLS—Construction — Perpetuities.—A bequest of the use of one-twentieth of the remainder of the estate of A, at his decease to go to his legal heirs, is not obnoxious to the common law rule against perpetuities.—HEALY v. HEALY, Conn., 39 Atl. Rep. 793.

122. WILL—Construction—Restraint of Marriage.—A bequest of income of a certain sum to a person so long as she remains single, and bears her then name, is not in restraint of marriage, but merely on a limitation as to time.—IN RE BRUCH'S ESTATE, Penn., 39 Atl. Rep. 813.

123. WILLS — Intention of Testator — Limitation by Condition.—Under a will, a certain clause of which devised the residue of testatrix's estate to her grandson, and a subsequent clause provided that, if such grandson should die leaving no wife and children, the property so bequeathed to him, and not used by him, should, after his decease, go to testatrix's niece and nephew, such property, on the death of such grandson without having disposed thereof, and leaving neither wife nor issue, passed to such niece and to the heirs of such nephew, who had died in the meantime, and not to the heirs of the deceased grandson.—ROBINSON v. FINCH, Mich., 74 N. W. Rep. 472.

124. WILLS—Rights of Devisees.—Where a testator devised and bequeathed to two minor granddaughters, children of a deceased daughter, one undivided share the residuum of his estate, and the will in terms declared that the income of the residuum should be paid over, share and share alike, to certain residuary devisees and legatees, including these granddaughters, who should take their share in the place of their deceased mother, they were, even during their minority, entitled annually to their share of such income, although it was in the will elsewhere declared that, in the event of the death of either or both of them before majority, or before a distribution of the estate, for which the will provided, "the distributive share" of such granddaughter or granddaughters should revert to the testator's estate.—PEARCE v. LOTT, Ga., 29 S. E. Rep. 276.

125. WILLS—Testamentary Capacity.—In determining the capacity of a testator to make a will, it is proper to show his habit of drinking intoxicating liquors, in connection with their effect on his mind at the time of the execution of the will.—BALL v. KANE, Del., 39 Atl. Rep. 778.

126. WILL—Testamentary Capacity—Delusion.—That testatrix was under a delusion as regards a relative whom she excluded from participation in her estate is not shown by evidence that, shortly before making the will, her feelings toward such relative underwent a marked change, so that she came to fear and dislike her.—IN RE MCGOVERN'S ESTATE, Penn., 39 Atl. Rep. 816.

127. WITNESS—Husband and Wife.—A husband cannot be examined as a witness without the wife's consent in a suit to subject real estate held by them as joint tenants to the payment of a judgment against the husband.—MICHIGAN BEEF & PROVISION CO. v. COLL, Mich., 74 N. W. Rep. 475.